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No. 92-602

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER and STEVEN LONG,

Petitioners,

vs.

MELVIN HICKS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

In a Title VII and 42 U.S.C. § 1983 action alleging unlawful discrimination, whether a judgment for the employee is compelled, as a matter of law, by a finding that the employer's legitimate, non-discriminatory reasons for adverse employment action are pretextual.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is reported at *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992), and may be found in the Appendix to the printed Petition for Writ of Certiorari ("Pet. App.") at page A-1. The Order and Memorandum of the District Court for the Eastern District of Missouri is reported at *Hicks v. St. Mary's Honor Center*, 756 F. Supp. 1244 (E.D. Mo. 1991) (Pet. App. A-13, A-14).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 23, 1992 (Pet. App. A-1). A petition for

rehearing or rehearing en banc was denied on September 3, 1992 (Pet. App. A-31). The petition for writ of certiorari was filed on October 5, 1992, and was granted on January 8, 1993. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1) (1988) ("Title VII"), provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988) ("§ 1983"), provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Melvin Hicks, a former supervisory employee of St. Mary's Honor Center ("St. Mary's"), a minimum security correctional facility of the Missouri Department of Corrections, brought this employment discrimination action against St. Mary's and Steven

Long, St. Mary's Superintendent.¹ Hicks, a black, alleged that his demotion and discharge were racially motivated. The district court found after trial that Hicks established a prima facie case, that St. Mary's and Long introduced evidence of legitimate, nondiscriminatory reasons for the demotion and discharge, and that Hicks proved those reasons were not the true reasons for his demotion and discharge. The district court further found, however, that Hicks did not prove by a preponderance of the evidence that his demotion and discharge were racially motivated and thus entered judgment in favor of defendants. Hicks appealed. The court of appeals reversed, ruling that once the district court found that the reasons proffered by defendants were not the true reasons for the demotion and discharge, it was compelled as a matter of law to enter judgment for Hicks.

Hicks began working at St. Mary's in August, 1978, as a correctional officer and was promoted to shift commander in February, 1980. Hicks remained shift commander until he was demoted, as set forth below. (Record ("R.") 1-13, 1-15.)

In 1983, George Lombardi, assistant director of the Division of Adult Institutions, received numerous complaints from inmates, former inmates, staff, legislators, and other citizens concerning conditions at St. Mary's. Lombardi placed an undercover investigator in St. Mary's to observe how the institution was being run. (R. 2-175-176, 2-181-182.) Lombardi also made a series of unannounced visits and found a poorly maintained institution with substandard upkeep, inadequate security measures, and no effective rules or regulations. (R. 1-10, 2-182-184, 1-186; Defendants' Exhibit ("Def. Ex.") DDD.) Lombardi

¹ Hicks alleged a Title VII violation by St. Mary's and a § 1983 violation by Long. Hicks also alleged a violation of 42 U.S.C. § 1981 (1988) ("§ 1981") against St. Mary's and Long. Summary judgment in favor of the defendants was granted on that claim, and Hicks did not challenge that judgment on appeal.

instructed Arthur Schulte, St. Mary's Superintendent, to improve conditions, but Schulte failed. From April of 1983 through all of 1983, Schulte did not initiate any disciplinary action against any employee. (R. 1-10, 2-184-188; Def. Ex. EEE.) In January of 1984, Lombardi demoted and transferred Schulte to another correctional institution and replaced him with Steven Long. (R. 2-191.) Both Schulte and Long are white.

Other personnel changes were made. Gilbert Greenlee, the chief of custody, was demoted and transferred, and Carl McAboy and Charles Woodard, the other two shift commanders (in addition to Hicks), were discharged. (R. 1-23-24.) Lombardi initially offered the chief of custody position to a black, Richard Childs, who did not accept the position. (R. 2-189-191, 2-194-195.) John Powell, a white, ultimately was hired to replace Greenlee as chief of custody. After these and other personnel changes, Lombardi found remarkable improvements in the operation of St. Mary's. (R. 1-10, 2-192-194; Def. Ex. HHH.)

Hicks' performance after the reorganization, however, began to deteriorate. On March 3, 1984, Hicks was serving as shift commander when transportation officers Edward Ratliff and Frank Slinkard arrived to pick up inmates who were scheduled for outside jobs that day. When Ratliff and Slinkard arrived at the facility, the front door officer, Donald Treglown, was not at his post. (Later, he was found balancing his checkbook in the break room.) The control center officer, Elvis Thomas, momentarily left his assigned post to open the front door. After Ratliff and Slinkard entered St. Mary's, they noticed that the first floor lights were off. Hicks, who was performing a perimeter check of the premises, and another officer, Charles Kennedy, were not present when Ratliff and Slinkard entered St. Mary's. (R. 1-38-42, 1-200-209.)

Ratliff wrote an incident report to Powell, the chief of custody, concerning the violation of institutional rules he observed on March 3, 1984, including (1) the front door officer's absence

from his post, (2) the control center officer's leaving his post to open the front door, (3) the absence of Charles Kennedy, and (4) the lights off on the first floor. (R. 1-9, 1-211-212; Def. Ex. Q.) A four-person disciplinary review board, composed of two whites and two blacks, met and recommended that Hicks — who was shift commander at the time of those incidents — be given a five-day suspension.² In accordance with the recommendation, Hicks was suspended for five days. (R. 1-10, 1-38, 1-46, 1-97, 1-114-115, 1-127; Def. Ex. MM.) Treglown, a white, and Thomas, a black, were not disciplined for leaving their posts. Kennedy, a black, was not disciplined for being absent. (R. 1-46-47, 1-126.) Powell testified that it was his policy to discipline only the shift commander for violations which occurred during his shift. (R. 2-20-22.)

Another incident involving Hicks occurred two weeks later. On March 19, 1984, correctional officer Don Moore was ordered to work a double shift. Moore had driven a borrowed automobile to work that day, and had to return it to a friend at the end of the first shift. Moore asked Hicks if another correctional officer could follow Moore to his friend's house in a St. Mary's vehicle, and then drive Moore back to St. Mary's. Hicks ordered correctional officer Jimmy Davis to follow Moore in a St. Mary's vehicle. Institutional rules provide that each use of a St. Mary's vehicle be entered into a log. Neither Hicks, Moore, Davis, nor the control center officer entered into the log book the use of the St. Mary's vehicle. (R. 1-51-53.)

Powell recommended Hicks be disciplined for failing to log the use of the St. Mary's vehicle. (R. 2-30-31.) On April 6, 1984, a four-person disciplinary review board, again composed of two blacks and two whites, convened and voted to recommend the

² The disciplinary review board makes a recommendation to the superintendent, who, in turn, makes a recommendation to the director of the Division of Adult Institutions, who makes the ultimate decision concerning discipline. (R. 1-115-116, 2-22-24, 2-108-109.)

demotion of Hicks. Powell, a member of this board, voted to discharge Hicks. Hicks was demoted for failing to ensure that the vehicle's use was logged. (R. 1-10, 1-54-55, 1-114-115; Def. Ex. OO.) Neither Moore, Davis, nor the control center officer were disciplined for failing to log the use of the vehicle. (R. 1-54, 2-62-64.) Moore and Davis are black.

Two days later, on March 21, 1984, two inmates were involved in a brawl in which one, Mark Valenti, was injured and received emergency medical treatment. After the brawl, Valenti told Hicks that he injured himself lifting weights. On the way to the hospital, Valenti admitted to correctional officer William Garrett that he was punched in the chest by inmate Allen Johnson. On March 21, Hicks drafted a memorandum to Powell informing him that there was a fight between Valenti and Johnson, injuring Valenti. Hicks ordered Garrett to submit a report. (R. 1-56-58.)

On March 24, 1984, Powell submitted a report to Steve Long in which he charged Hicks with failure to investigate the assault. Powell stated, "Although the medical outcount was logged, and a memorandum was submitted, NO ACION [sic] was taken by the Shift Commander in investigating the seriousness of the assault or the aftereffect to the residents involved." On March 29, 1984, Powell issued Hicks a letter of reprimand for failing to investigate the incident. (R. 1-10, 1-58-59, 2-38-39; Def. Ex. DD.)

On April 19, 1984, Hicks was notified of his demotion in a meeting with Long, Vincent Banks (the assistant superintendent), and Powell. Hicks was shaken by the news and requested the rest of the day off. Long granted Hicks' request. (R. 1-67-70.) Powell followed Hicks out of Long's office, so close, according to Hicks, that Powell was "stepping on the heels [sic] of my shoe." (Joint Appendix ("J.A.") 21.) Powell was "hollering in my ear," "following me and chasing me up and down," and "cutting me off, he wouldn't let me go out the door." (J.A. 21-22.) Powell protested to the control center officer that Hicks

could not take compensatory time off and demanded that Hicks open his locker to remove the sergeant's manual which had papers in it needed by Hicks' replacement. (J.A. 21-22, 35-36.) "He was shouting loud and belligerant [sic] for me to open my locker." (J.A. 23.) Hicks refused to go to the locker room to open his locker because "[w]ell, I knew if I went back there, it probably would have been a fight, because I was angry and Captain Powell was angry, too, and he kept provoking me." (J.A. 23.) Hicks was so shocked by Powell's conduct that Hicks asked Powell:

So I asked him, I said, "Hey, you're a man and I am a man. Hey, you don't have to treat me like that, you know. Treat me like a man."

Just like that.

And he kept looking at me, laughing in my face.

So I asked him, "What are you trying to do, provoke me and make me fight you?"

And he said, "Yes."

(J.A. 24.) Hicks believed they were close to blows, but Horace Williams, who believed the situation was "getting out of hand" and was concerned that a physical altercation might occur, stepped between them and physically took Hicks out of the door. (J.A. 24, 29.) Powell heard Hicks say that he wanted Powell to "go out to the street with him," and Powell told Hicks that the statement could be misconstrued as a threat. (J.A. 38.)

Powell sought disciplinary action against Hicks for the threats made against him during the April 19, 1984, confrontation. On May 9, 1984, a four-person disciplinary board composed of at least two blacks convened and voted to suspend Hicks for three days. Long, however, disregarded their vote and recommended termination. Long testified that he based his decision on the

severity and accumulation of Hicks' violations. On June 7, 1984, Hicks was terminated. (R. 1-10, 1-75-76, 2-102-105; Def. Ex. QQ.)

As stated previously, numerous personnel changes occurred at St. Mary's in 1984. During the course of 1984, thirteen black employees were hired. In January, 1984, thirty blacks were employed at St. Mary's. By December, 1984, with all the organizational changes, twenty-nine blacks still were employed at St. Mary's. (R. 2-109-112.)

In 1980 and 1981, James Davis performed a study of the honor centers in St. Louis and Kansas City. The Davis study is a comprehensive comparison of the two institutions which discussed their shortfalls and suggested means of improvement. In a section toward the end of the study, Davis pointed out that too many blacks were in positions of power at St. Mary's and that the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real. (R. 1-4; Davis Deposition ("Dep.") 17, Dep. Ex. 1, at page 83.) Powell, Long, and Lombardi were not aware of the Davis study at the time of the 1984 personnel changes. (R. 2-48, 2-102, 2-195-196.) The author of the study characterized the potential for subversion as "brainstorming" and had "reservations" about whether it should have been included in the study or was "actually worth much." (R. 1-4; Davis Dep., 17-18, 54.)

After trial, the district court found that Hicks had established a prima facie case of racial discrimination because he (1) was a member of a protected class, (2) met the applicable job qualifications of a shift commander, (3) was demoted and discharged, and (4) his shift commander's position was filled by a white. (Pet. App. A-22 - A-23.) The district court further found that St. Mary's and Long introduced evidence of two legitimate, nondiscriminatory reasons for Hicks' demotion and discharge, which were the (1) severity and (2) accumulation of violations of institutional rules over a short period of time. (Pet. App. A-23.)

The district court also found that Hicks proved that the reasons adduced by St. Mary's and Long for Hicks' demotion and discharge were not the true reasons. First, the court indicated that Hicks was the only person disciplined for institutional rule violations actually committed by his subordinates. Second, though the chief of custody claimed it was his policy to discipline the shift commander for his subordinates' rule violations, a white shift commander was not so disciplined. Third, white employees were not disciplined for committing more serious rule violations than Hicks committed. Fourth, the chief of custody "manufactured" a confrontation between himself and Hicks that led to Hicks' discharge. (Pet. App. A-23 - A-26.)

The district court nonetheless concluded that Hicks failed to prove by a preponderance of the evidence his "ultimate burden" that his demotion and discharge were racially motivated. (Pet. App. A-26.) First, though Hicks proved that he was disciplined more harshly than his co-employees, his black subordinates, who actually committed the institutional rule violations for which Hicks was disciplined, were not disciplined at all. (Pet. App. A-27.) Second, between January and December of 1984, St. Mary's hired thirteen blacks. Even after the reorganization, the number of blacks at St. Mary's remained virtually constant; thirty blacks were employed at St. Mary's in January of 1984 and twenty-nine in December of 1984. (Pet. App. A-27.) Third, the full-scale removal of employees from supervisory positions is often required when an institution is as poorly run as St. Mary's. (Pet. App. A-28.) Fourth, before January of 1984, blacks held five of the six supervisory positions at St. Mary's. After January of 1984, two blacks and four whites held supervisory positions, and if the black to whom the chief of custody position initially had been offered had accepted the position, three whites and three blacks would have held supervisory positions. (Pet. App. A-27 - A-28.) Fifth, the disciplinary review board that reviewed Hicks' violation which led to his demotion was composed of two blacks and two whites and recommended demotion. (Pet. App.

A-28.) Sixth, Powell, Long, and Lombardi were never aware of the study which warned that black persons possessed too much power at St. Mary's. (Pet. App. A-28.)

The district court entered judgments in favor of St. Mary's on the Title VII action and in favor of Steven Long on the § 1983 action. (Pet. App. A-13, A-29, A-30.) The Court of Appeals for the Eighth Circuit concluded, however, that once the district court found that Hicks had proven pretext, "[t]he record of the district court thus contain[ed] the necessary findings to compel a conclusion that plaintiff is entitled to judgment as a matter of law." (Pet. App. A-12.) The court of appeals reversed the judgments of the district court. (Pet. App. A-12.)

SUMMARY OF ARGUMENT

In a disparate treatment, employment discrimination case under Title VII and § 1983, judgment for the employee is not compelled, as a matter of law, by a finding that the employer's legitimate, nondiscriminatory reason for the adverse employment action is pretextual. The employee retains at all times the burden of proving by a preponderance of the evidence intentional discrimination on the part of the employer. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Absent a factual finding of intentional discrimination, judgment must be entered in favor of the employer. *U. S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). Here, the district court weighed the evidence and made a factual finding of no intentional discrimination. That finding was not clearly erroneous and must be upheld.

The *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), three-step analytical framework does not, and does not purport to, eliminate or reduce the employee's burden to prove intentional discrimination. Rather, that case merely provides the employee with an initial presumption of discrimination once the employee has established a prima facie case of discrimination.

Burdine, 450 U.S. at 254, and n. 7. After the employer rebuts that presumption by merely offering evidence of, not proving, a legitimate, nondiscriminatory reason for the adverse employment action, that initial presumption drops from the case. *Burdine*, 450 U.S. at 255, and n. 10. The employee then must go forward and prove by a preponderance of the evidence intentional discrimination.

Here, the district court found that the employee had established a prima facie case of discrimination and that defendants had rebutted the prima facie case by offering evidence of legitimate, nondiscriminatory reasons for the adverse employment action. Thus, the presumption of discrimination dropped from the case, and plaintiff was required to prove intentional discrimination. The district court weighed all the evidence and concluded that no intentional discrimination occurred. Indeed, the district court found that the employee introduced through his own testimony evidence of personal animosity his immediate supervisor had toward him. The district court made the credibility determination that the supervisor's personal animosity was the truthful explanation for the employment decision. The district court found that there was other evidence that undermined any finding of intentional discrimination, including:

- * the number of blacks employed over a period of time remained constant despite numerous organizational changes;
- * a full-scale change in supervisory personnel was made necessary by how poorly the institution was run;
- * the number of blacks and whites in supervisory positions would have been equal if the black to whom the chief of custody position was first offered had accepted the position;
- * a committee composed of two blacks and two whites had recommended the employee's demotion; and

- * no one recommending employment action was aware of a study which warned that blacks possessed too much power.

An "issue of fact remains in the case," *Burdine*, 450 U.S. at 254, when not "all legitimate reasons for [the employment decision] have been eliminated as possible reasons for the employer's action." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). Any reason supported by the evidence and not prohibited by Title VII is a lawful justification for an adverse employment action. Otherwise, Title VII becomes a statute prohibiting those reasons for employment decisions which may be proper or improper, but not discriminatory. Lawful justifications may include a host of motives, including personal animosity.

The court of appeals wrongly concluded that a judgment for the employee is compelled merely by a finding that the reasons adduced by the employer were not the true reasons for the adverse employment action. That conclusion ignores this Court's precedent that intentional discrimination is a factual question of actual motive, rather than a legal presumption to be drawn from a showing of something less than actual motive. See *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982). The court of appeals also mistakenly relied on the prima facie presumption after that presumption had been rebutted and thus dropped from the case. That reasoning in effect removes the trier of fact from the decision-making process in Title VII cases and emasculates the requirement that the plaintiff prove intentional discrimination. The court of appeals' decision must be reversed, and the sound decision of the district court must be reinstated.

ARGUMENT

IN A TITLE VII AND § 1983 ACTION ALLEGING UNLAWFUL DISCRIMINATION, JUDGMENT FOR THE EMPLOYEE IS NOT COMPELLED, AS A MATTER OF LAW, BY A FINDING THAT THE EMPLOYER'S LEGITIMATE, NONDISCRIMINATORY REASONS FOR ADVERSE EMPLOYMENT ACTION ARE PRETEXTUAL.

A. INTENTIONAL DISCRIMINATION IS A FACTUAL QUESTION OF ACTUAL MOTIVE, RATHER THAN A LEGAL PRESUMPTION.

In a Title VII and § 1983 case alleging disparate treatment, the "factual inquiry" is whether the employer "intentionally discriminated" against the employee. *U. S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983), quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The ultimate burden of persuading the trier of fact by a preponderance of the evidence that the employer intentionally discriminated remains at all times with the employee. *Burdine*, 450 U.S. at 253. "[P]roof of discriminatory motive is critical" in disparate treatment cases. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

Intentional discrimination is a factual question of "actual motive" reviewable on appeal under the clearly erroneous standard, rather than just a "legal presumption to be drawn from a factual showing of something less than actual motive." See *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982) (under § 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1988), forbidding racial discrimination in a seniority system); *E.E.O.C. v. Flasher Co.*, No. 91-6279 (10th Cir. Dec. 29, 1992) (available on WESTLAW, 1992 WL 3843935, *3-4) (under 42 U.S.C. § 2000e-2(a)(1) (1988)); and *Holder v. City of Raleigh*, 867 F.2d 823, 827-829 (4th Cir. 1989) (same).

Where the employee attempts to prove intentional discrimination by indirect rather than direct evidence, the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), three-step analytical framework applies.³ *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), citing *Teamsters*, 431 U.S. at 358 n. 44. At the first step, the employee has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. *Burdine*, 450 U.S. at 252-253. If established, a prima facie case creates a "rebuttable presumption," *Burdine*, 450 U.S. at 254 n. 7, of discrimination.

At the second step, if the employee established a prima facie case, the burden of production, not persuasion, shifts to the employer to introduce evidence of, not prove, a legitimate, nondiscriminatory reason for the employment decision. *Burdine*, 450 U.S. at 254-255. The employer need not convince the trier of fact that it was actually motivated by the proffered reason, but must only introduce evidence which is legally sufficient to justify a judgment for the employer. *Id.*

At the third step, if the employer carried its burden of production, the presumption raised by the prima facie case is rebutted, the presumption "drops from the case," *Burdine*, 450 U.S. at 255, and n. 10, and the trier of fact should proceed directly to decide the ultimate question of intentional discrimination. *Aikens*, 460 U.S. at 715-716.⁴

³ The framework also is applied to disparate treatment cases brought under §§ 1981 and 1983. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Richmond v. Board of Regents*, 957 F.2d 595 (8th Cir. 1992).

⁴ One way in which an employee may attempt to raise a permissible inference of intentional discrimination is to show that the employer's proffered legitimate, nondiscriminatory reason for the employment decision was not the true reason or, in other words, was a mere "pretext." See *Burdine*, 450 U.S. at 256. Pretext is not, however, synonymous with pretext for discrimination or intentional discrimination. Citing *Mister v. Illinois Central Gulf Rr. Co.*, 832 F.2d 1427, 1435 (7th Cir. 1987), the district court defined pretext as follows:

(Footnote 4 continued on next page)

Because "the elusive factual question of intentional discrimination," *Burdine*, 450 U.S. at 254 n. 8, is "both sensitive and difficult," *Aikens*, 460 U.S. at 716, this Court has issued the following warning:

The prima facie case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."

Aikens, 460 U.S. at 715, quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). The sensitive and difficult question facing triers of fact in discrimination cases is best resolved by focusing on the ultimate question of discrimination, rather than the individual segments of the *McDonnell Douglas* allocation of burdens of proof. *Aikens*, 460 U.S. at 715-716. The three-step *McDonnell Douglas* framework for analyzing a Title VII case alleging disparate treatment "was never intended to

(Footnote 4 continued)

Pretext is a statement that does not describe the actual reason for the decision.

(Pet. App. A-23.) This definition is consistent with this Court's definition of pretext, "that the proffered reason is not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. A plain-spoken definition of pretext which also is consistent with this Court's definition is "a phony reason." *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 657 (7th Cir. 1991). Judge Posner's more elaborate definition makes clear that a showing of pretext raises only an inference of, not a presumption of, intentional discrimination:

A pretext, in employment law, is a reason that the employer offers for the action claimed to be discriminatory and that the court disbelieves, allowing an inference that the employer is trying to conceal a discriminatory reason for his action. It is not . . . an unethical reason for action, or a mask for such a reason.

Visser, 924 F.2d at 657 (emphasis added).

provide a mechanistic approach to what ultimately becomes a straightforward trial about motive." *Flasher*, 1992 WL 3843935, at *2.

B. WHERE INDIRECT EVIDENCE OF INTENTIONAL DISCRIMINATION DOES NOT ELIMINATE ALL LAWFUL REASONS FOR THE EMPLOYMENT DECISION SUPPORTED BY THE EVIDENCE, JUDGMENT FOR THE EMPLOYEE IS NOT COMPELLED.

Where indirect evidence of intentional discrimination does not eliminate all lawful reasons for the employment decision supported by the evidence, judgment for the employee is not compelled. Legitimate, nondiscriminatory reasons for the employment decision, not proffered or articulated by the employer, may emerge during the employee's case or be suggested by the employer's evidence.

This Court has explained, in the context of the prima facie case, that a presumption of discrimination remains only "when *all* legitimate reasons for [the employment decision] have been eliminated as possible reasons for the employer's actions." *Furnco*, 438 U.S. at 577 (emphasis added). This Court also has explained, in the same context, that "[e]limination" of the employer's reasons for the employment decision is sufficient to create a presumption of discrimination "absent other explanation." *Teamsters*, 431 U.S. at 358 n. 44.

Therefore, it is not only the falsity of the proffered justification for the employment decision, but also the absence of any other justification supported by the record, that establishes intentional discrimination.

It must be recognized, however, that it is not merely the falsity or incorrectness of the articulated reason that gives rise to the conclusion of pretext. Rather, it is [also] the resulting

absence of a legitimate explanation for the suspect employment decision that warrants the finding of discrimination.

Sims v. Cleland, 813 F.2d 790, 793 (6th Cir. 1987). When not "all legitimate reasons for [the employment decision] have been eliminated as possible reasons for the employer's action," *Furnco*, 438 U.S. at 577, an "issue of fact remains in the case." *Burdine*, 450 U.S. at 254.

Where indirect evidence does not eliminate all lawful reasons for the employment decision supported by the evidence, the trier of fact is not compelled to find intentional discrimination and return a judgment for the employee. Rather, the trier of fact must weigh all the evidence — as the district court did here — and make a factual and credibility determination as to whether intentional discrimination has occurred. The trier of fact may return a judgment for the employee based upon an inference of discrimination drawn from the indirect evidence that the employer's proffered justification for the employment decision was not its true justification. The trier of fact, however, may return a judgment for the employer based upon its determination that the true reason for the employment decision was a lawful, nondiscriminatory reason contained in the record — here, personal animosity. What judgment the trier of fact returns will be determined by which explanation for the employment decision, discrimination or the remaining lawful reason, the trier of fact believes to be the truthful explanation for the employment decision. Those types of factual determinations must be made by the fact finder — not an appellate court.

C. ANY REASON SUPPORTED BY THE EVIDENCE AND NOT PROHIBITED BY TITLE VII IS A LAWFUL REASON FOR THE EMPLOYMENT DECISION.

Any reason supported by the evidence and not prohibited by Title VII is a lawful justification for an adverse employment

action. Otherwise, Title VII becomes a statute prohibiting those reasons for employment decisions which may be proper or improper, but not discriminatory. Possible reasons are a violation of a civil service system or collective bargaining agreement, personal or political favoritism, nepotism, a grudge, personal animosity, random conduct, an accident, a mistake, an error in the administration of neutral rules, a desire to deter violence in the workplace, financial pressure to reduce expenses, the efforts of new management to assert its authority, and even discrimination not prohibited by Title VII, such as age discrimination.

Even assuming the original prima facie case plus the evidence of pretext suffices to raise a reasonable inference of discrimination, this does not automatically entitle plaintiff to judgment. Provided a contrary inference (of nondiscrimination) might also reasonably be drawn from the evidence, such showing only creates an issue of material fact for trial and, if discrimination is subsequently found, will support that finding.

Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991).

In *Holder v. City of Raleigh*, 867 F.2d 823 (4th Cir. 1989), a judgment for the city on Holder's Title VII claim was affirmed. Holder claimed he was not appointed to one of two openings in the ground maintenance crew because of his race. The district court found that Holder proved a prima facie case and that the city's legitimate, nondiscriminatory reasons of a low interview score and administrative inconvenience were pretextual. The district court further found that pretext did not prove racial discrimination, but rather proved nepotism in filling the ground maintenance crew positions with the son of the crew supervisor and the nephew of one of the interviewers. *Holder*, 867 F.2d at 824-826. The appellate court recognized the facts that all of the interviewers were white, six of the seven crew supervisors were white, and the effect nepotism would have on minorities would

be relevant to and provide a basis for inferring racial discrimination. Such an inference was not compelled, though, because an "intention to discriminate remains a question to be resolved by the ultimate trier of fact." *Holder*, 867 F.2d at 827. The appellate court reasoned that finding the city's legitimate nondiscriminatory reasons to be pretextual or unworthy of credence did not compel judgment for the employee because "[t]he reason for the lack of credence must be the underlying presence of proscribed discrimination." *Holder*, 867 F.2d at 827-828.

In *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1497, 117 L.Ed.2d 637 (1992), the employer discharged Galbraith and Hunter, a white woman and a black man who were dating. Hunter was ostensibly discharged because he abused personal leave by not immediately traveling to New Orleans for his mother's personal crisis. Galbraith was ostensibly discharged for abusing medical leave after she was shot by Hunter in the parking lot of their work place when Hunter was supposed to have been in New Orleans. The court thought it "apparent" that the legitimate, nondiscriminatory reasons proffered by Northern Telecom were pretextual, but that pretext did not establish racial discrimination.

The court thought that the "far more compelling" explanation for Galbraith and Hunter's discharge was Northern Telecom's concern that Galbraith and Hunter's association demonstrated a propensity for violence which threatened the safety and lives of its personnel. *Galbraith*, 944 F.2d at 282-283. The court stated: "A reason is legitimate for purposes of civil rights law if it is nondiscriminatory, even if it is mean-spirited, ill-considered, inconsistent with humane personnel policies, or otherwise objectionable." *Galbraith*, 944 F.2d at 282. The court also stated: "Under Title VII, association with a violent person would be a legitimate reason for discharging Galbraith, because it is not motivated by racial considerations." *Id.*

The court did not believe that the findings of pretext but no intentional discrimination violated the *McDonnell Douglas* framework because the employer had only a burden of production, and the employees' burden of persuasion that the proffered reasons were pretextual was the same as their ultimate burden of intentional discrimination. *Galbraith*, 944 F.2d at 283.

Judge Posner, writing for the Court of Appeals for the Seventh Circuit, has stated:

If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind the rule of *McDonnell Douglas*. It is important to understand, however, that the inference is not compelled. The trier of fact must decide after a trial whether to draw the inference. The lie may be concealing a reason that is shameful or stupid but not proscribed, in which event there is no liability. . . . The point is only that if the inference of improper motive can be drawn, there must be a trial.

Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990) (citation omitted).

The Seventh Circuit has also stated:

Benzies argues that if the plaintiff does so — in the argot, shows that the explanation is a "pretext" — then the district court must infer that the employer acted with discriminatory intent. Not so. The demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, but it does not compel such an inference as a matter of law. The judge may conclude after hearing all the evidence that neither discriminatory intent nor the employer's explanation accounts for the decision.

Benzies v. Illinois Dept. of Mental Health and Developmental Disabilities, 810 F.2d 146, 148 (7th Cir.), cert. denied, 483 U.S. 1006 (1987).

The Seventh Circuit has recognized that the reason a finding of intentional discrimination is not compelled by a finding of pretext is that discrediting a legitimate, nondiscriminatory reason for adverse employment action does not necessarily eliminate all lawful motives for the employment decision.

A public employer may feel bound to offer explanations that are acceptable under a civil service system, such as that one employee is more skilled than another, or that "we were just following the rules." The trier of fact may find, however, that some less seemly reason — personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules — actually accounts for the decision. Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute. . . . Unless the employer acted for a reason prohibited by the statute, the plaintiff loses. The failure of an explanation to persuade the judge supports an inference that a bad reason accounts for the decision, but it is not invariably conclusive; the presence of a sufficient explanation, however, is dispositive against the plaintiff. (A "sufficient" explanation is one that would produce the same decision whether or not the prohibited characteristic played some role.)

Benzies, 810 F.2d at 148 (citation omitted).

Showing that the employer dissembled is not necessarily the same as showing "pretext for discrimination" It is easy to confuse "pretext for discrimination" with "pretext" in the more common sense (meaning any fabricated explanation for an action)

Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, 559 (7th Cir.), cert. denied, 484 U.S. 977 (1987). See also *Veatch v. Northwestern Memorial Hospital*, 730 F. Supp. 809, 819 (N.D. Ill. 1990), where the record suggested financial pressure to

reduce expenses, efforts by new management to assert its authority, and discrimination not prohibited by Title VII (age discrimination) as explanations for the employment decision.

In *E.E.O.C. v. Flasher Co., Inc.*, No. 91-6279 (10th Cir. Dec. 29, 1992) (available on WESTLAW, 1992 WL 3843935), the employer disciplined less severely non-minority employees who had committed infractions that were of equal seriousness as the infraction that the discharged minority employee committed. Judgment for the employer was affirmed because differential treatment between a minority employee and a nonminority employee that is irrational or accidental does not necessarily compel a finding of intentional discrimination. The court stated:

Indeed, even a finding that the reason given for the discipline was pretextual does not compel such a conclusion Merely finding that people have been treated differently stops short of the crucial question: why people have been treated differently. While comparing specific disciplinary actions can give rise to an inference of discrimination, it need not do so. Proffered reasons may be a pretext for a host of motives, both proper and improper, that do not give rise to liability under Title VII.

Flasher, 1992 WL 3843935, at *7 (citation omitted).

D. IN THIS CASE, THOUGH THE DISTRICT COURT FOUND PRETEXT, IT BELIEVED THE EMPLOYEE'S OWN EVIDENCE OF HIS IMMEDIATE SUPERVISOR'S PERSONAL ANIMOSITY TO BE THE TRUTHFUL EXPLANATION FOR THE EMPLOYMENT DECISION.

The district court found that the evidence introduced by Hicks demonstrated a lawful reason for Hicks' demotion and discharge. Hicks testified on direct examination that after he was informed of his demotion, Powell, the chief of custody, admitted

he was trying to provoke Hicks to fight by following Hicks so closely as to step on the heels of his shoes, hollering in his ear, chasing him, blocking his exit, shouting loudly and belligerently, and laughing in his face. (J.A. 21-24.) An eyewitness to the confrontation between Powell and Hicks stepped between them and took Hicks out the door to prevent a fight. (J.A. 29.) This testimony led the district court to believe Powell manufactured the confrontation between himself and Hicks in order to discharge Hicks.

The violation for which plaintiff was terminated involved plaintiff making threats to Powell. Although the court does not condone the threatening of one's supervisor, the evidence suggests that Powell manufactured the confrontation between plaintiff and himself in order to terminate plaintiff. After plaintiff was informed of his demotion, he was distressed and requested the day off. Steven Long granted the request. As plaintiff attempted to leave, Powell followed him and provoked him into behaving irrationally.

(Pet. App. A-26, footnote omitted.) This evidence that Powell manufactured the confrontation in order to discharge Hicks provided the lawful reason for Hicks' discharge, the personal animosity between Powell and Hicks. The district court stated:

It is clear that John Powell had placed plaintiff on the express track to termination. It is also clear that Powell received the aid of Ed Ratliff and Steve Long in this endeavor. The question remains, however, whether plaintiff's race played a role in their campaign.

* * *

In essence, although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated.

(Pet. App. A-26, A-27.)³

In addition to this proof of a lawful reason for Hicks' demotion and discharge, Powell's personal animosity toward Hicks, the district court cited other evidence that undermined any inference of intentional discrimination. Though Hicks proved that he was disciplined more harshly than his co-employees, his black subordinates, who actually committed the institutional rule violations for which Hicks was disciplined, were not disciplined at all. (Pet. App. A-27.) Between January and December of 1984, thirteen blacks were hired at St. Mary's. Thirty blacks were employed at St. Mary's in January of 1984 and twenty-nine still were employed in December of 1984. (Pet. App. A-27.) A full-scale removal of employees from supervisory positions is often required when an institution is as poorly run as St. Mary's. (Pet. App. A-28.) Before January of 1984, blacks held five of the six supervisory positions at St. Mary's. After January of 1984, two blacks and four whites held supervisory positions, and if the black to whom the chief of custody position was initially offered had accepted the position, three whites and three blacks would have held supervisory positions. (Pet. App. A-27 - A-28.) The disciplinary review board which reviewed Hicks' violation which led to his demotion, composed of two blacks and two whites, recommended demotion. (Pet. App. A-28.) Powell, Long, and Lombardi were never aware of the study which warned that black persons possessed too much power at St. Mary's. (Pet. App. A-28.) The district court weighed all the evidence, in addition to the employee's evidence of his supervisor's personal animosity, and made the factual determination that intentional discrimination did not occur. That factual determination is not clearly erroneous.

³ The court of appeals was thus incorrect when it characterized the district court's finding that the employment decision was motivated by personal animosity as an "assumption." (Pet. App. A-10.) As pointed out by the district court, Hicks' own testimony provided evidence of that personal animosity.

E. THE COURT OF APPEALS' REASONING THAT A FINDING OF PRETEXT COMPELS JUDGMENT FOR THE EMPLOYEE MISTAKENLY APPLIES THE PRESUMPTION OF DISCRIMINATION OF THE PRIMA FACIE CASE AFTER IT HAS BEEN REBUTTED AND DROPPED FROM THE CASE.

The Court of Appeals for the Eighth Circuit reversed the district court's judgments and stated its reasoning that judgment for Hicks was compelled as follows:

Once plaintiff proved all of the defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law. Because all of defendants' proffered reasons were discredited, defendants were in the position of having no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.

(Pet. App. A-10.)

The Eighth Circuit's reasoning ignores the precedent of this Court and other circuits that intentional discrimination is a factual question of actual motive, rather than a legal presumption to be drawn from a factual showing of something less than actual motive. This reasoning is merely a mistaken application of the "rebuttable presumption," *Burdine*, 450 U.S. at 254 n. 7, of the prima facie case after it has been rebutted and dropped from the case, *Burdine*, 450 U.S. at 255, and n. 10, by evidence of the employer's justification for the employment decision. This reasoning has been specifically rejected by another circuit.

It was suggested at oral argument in this case that a mechanical application of the *McDonnell Douglas* frame-

work was the correct one. Under that analysis, once a plaintiff has produced evidence of pretext, the employer's justification vanishes, and the original *McDonnell Douglas* inference of discrimination rises again We reject that formalistic approach as not in keeping with either the Supreme Court doctrine or common sense.

Villanueva v. Wellesley College, 930 F.2d 124, 128 (1st Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 181, 116 L.Ed.2d 143 (1991). The Eighth Circuit's reasoning removes from the trier of fact the decision making power in Title VII cases and mandates judgment for the employee even if, as here, the trier of fact believes that a nondiscriminatory reason was the truthful reason for the employment decision. The Eighth Circuit's reasoning must be rejected.

In summary, the district court properly realized that intentional discrimination is the key factual issue in an employment discrimination case. The district court believed that the supervisor's personal animosity was the truthful explanation for the employment decision, rather than either intentional discrimination or the employer's proffered justifications. Therefore, the district court properly found that the employee had not proven intentional discrimination and entered judgments accordingly. The district court's conclusion is consistent with Title VII, the decisions of this Court, and common sense, is not clearly erroneous, and must be upheld.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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